IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

TUESDAY, THE 20TH FEBRUARY 2007 / 1ST PHALGUNA 1928

Crl.MC.No. 410 of 2007()

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CP.67/2001 of JUDL. MAGISTRATE OF FIRST CLASS COURT-III, TRIVANDRUM
CRIME NO.28 OF 2000 OF THE KAZHAKUTTOM POLICE STATION

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PETITIONER:

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SABU, S/O. PRABHAKARAN,
N.K.VILASOM, KATTUKULAM, MENAMKULAM VILLAGE,
KAZHAKUTTOM, THIRUVANANTHAPURAM.

BY ADV. SRI.PIRAPPANCODE V.SREEDHARAN NAIR
SRI.PIRAPPANCODE V.S.SUDHIR

RESPONDENTS:

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STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR, OFFICE OF THE ADVOCATE
GENERAL, HIGH COURT BUILDINGS, ERNAKULAM.
(SUB INSPECTOR OF POLICE, KAZHAKUTTOM POLICE
STATION.)

BY PUBLIC PROSECUTOR SRI.GIKKU JACOB

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 20/02/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**R.BASANT, J**

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**Crl.M.C.No.410 of 2007**

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Dated this the 20th day of February, 2007

**ORDER**

Is the offence under Section 5 of the Explosive Substances Act prior to amendment in 2002 which inter alia carried a punishment of transportation for 14 years, one exclusively triable by a Court of Session ? This is the short point for consideration in this Crl.M.C.

2. The petitioner is the accused along with others in a crime registered, inter alia, under Section 5 of the Explosive Substances Act and Section 435 read with 149 I.P.C. The case against the co-accused has already been committed to the Court of Sessions as per order dated 09.12.2002 in C.P.67 of 2001 passed by the learned Magistrate, a copy of which is produced as Annexure-VI. As the petitioner (accused No.3) was not available for committal, the case against him has been refiled as C.P.57 of 2002. On coming to know of the proceedings against him, the petitioner had appeared before the learned Magistrate and has now been enlarged on bail as per order of the Sessions Court, a copy of which is produced as Annexure-V.

3. The petitioner has come to this Court raising a grievance that the case against him has been unnecessarily registered as a committal proceedings. No committal is required. The offence is triable by the First Class Magistrate and in these circumstances,

registration of the case as a committal proceedings is bad in law. The petitioner apprehends that the learned Magistrate may repeat the error which has been committed in Annexure-VI order in respect of the co-accused - of committing the case to the Court of Sessions. In these circumstances, it is prayed that it may be clarified that registration of the case as a committal proceedings, is incorrect in law and that trial must be held before the learned Magistrate.

4. The co-accused have already been committed. This contention will be available to the petitioner under Section 228 Cr.P.C even if the case against him were committed to the Court of Session. But the learned counsel for the petitioner submits that the petitioner may be saved of the unnecessary trauma of committal to the Court of Session when in fact under law such course is impermissible. The learned counsel for the petitioner submits that even though the petitioner had raised this contention specifically before the learned Sessions Judge in the application for bail filed by him, the learned Sessions Judge, though he referred to the contention in para.4 of Annexure-V order, has not issued any specific directions.

5. All the other offences in which the petitioner faces indictment are without dispute triable by a Magistrate of the First Class. The only dispute is about Section 5 of the Explosive Substances Act. The alleged offence was committed on 30.01.2000.

There has been an amendment of Section 5 of the Explosive Substances Act, which came into force w.e.f. 01.02.2002. We are not concerned with that amendment in this case. The law applicable must be ascertained as on the date of commission of the offence and Section 5 of the Explosives Substances Act as it stood on the relevant date reads as follows:

> "Section 5. **Punishment for making or possessing explosives under suspicious circumstances**: Any person who makes or knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be punishable with **transportation for a term which may extend to fourteen years**, to which fine may be added, or with imprisonment for a term which may extend to five years, to which fine may be added."

(emphasis supplied)

Imprisonment for 5 years is the term of imprisonment fixed. There is of course a stipulation that the offence is punishable with transportation for a term which may extend to 14 years also.

6. Transportation is not a punishment which can be imposed under law after the amendment of the Penal Code w.e.f. 01.01.1956. Amendment has been made in Section 53 I.P.C dealing with punishments and the third clause which authorised the imposition of punishment of transportation has been deleted. Consequently Section 53 A I.P.C has been introduced into the Code and that deals with the

question as to how references to transportation in the Penal Code and other enactments are to be construed.

7. I extract Section 53 A (1) to (4) below for easy reference.

> "53-A. **Construction of reference to transportation** - (1) Subject to the provisions of sub-section(2) and sub section(3), any reference to "transportation for life" in any other law for the time being in force or in any instrument or order having effect by virtue of any such law or of any enactment repealed shall be construed as a reference to "imprisonment for life".
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> (2) In every case in which a sentence of transportation for a term has been passed before the commencement of the Code of Criminal Procedure (Amendment) Act, [1955](26 of 1955), the offender shall be dealt with in the same manner as if sentenced to rigorous imprisonment for the same term.
>
> (3) **Any reference to transportation for a term or to transportation for any shorter term (by whatever name called) in any other law for the time being in force shall be deemed to have been omitted**.
>
> (4) Any reference to "transportation" in any other law for the time being in force shall,-
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> (a) if the expression means transportation for life, be construed as a reference to imprisonment for life;
>
> (b) if the expression means transportation for any shorter term, be deemed to have been omitted."
>
> (emphasis supplied)

8. What is specifically applicable to us is Section 53 A (3) of the Penal Code. It shows that any reference to transportation for a term shall be deemed to have been omitted. Under Section 5, transportation for a term which may extend to 14 years was a possible punishment if the Code does recognise such punishment. Consequent

to the amendment of Section 53 in the light of Section 53 A(3), the reference to transportation must be deemed to have been omitted.

9. What follows is that the offence is punishable with fine or with imprisonment for a term which may extend to 5 years only.

10. In as much as a forum for trial is not specified in the special statute (ie. the Explosive Substances Act), one has got to take assistance from the schedule to the Code of Criminal Procedure. Offences punishable with imprisonment for a term which may extend to 5 years are triable by the Magistrate of the First Class as per the relevant entry in part II of the first schedule to the Code of Criminal Procedure. Trial can hence be held before the learned Magistrate. The petitioner is correct in his submission that registration of the proceedings against him as a committal proceedings is incorrect and not justified.

11. This Crl.M.C is, in these circumstances, allowed. It is clarified that the offence under Section 5 of the Explosive Substances Act is triable by a Magistrate of the First Class for the reasons indicated above. Consequently the learned Magistrate is directed to renumber the proceedings as a C.C and proceed further with the matter.

12. A copy of this order shall be forthwith forwarded to the learned Sessions Judge, who shall proceed to pass appropriate

consequent orders under Section 228 Cr.P.C in the case of the co-accused committed to the Sessions Court as per order dated 09.12.2002 in C.P.67 of 2001passed by the learned Judicial Magistrate of the First Class-III, Trivandrum, so that trial of all the accused can be undertaken simultaneously, by the learned Magistrate.

**(R.BASANT, JUDGE)**

rtr/-